REDEVELOPMENT AGENCY OF THE
CITY OF OAKLAND
AGENDA REPORT

TO: Office of the Agency Administrator
ATTN: Deborah Edgerly
FROM: Community and Economic Development Agency
DATE: May 10, 2005

RE: RESOLUTION AUTHORIZING AN AMENDMENT TO AN OWNER PARTICIPATION AGREEMENT WITH EAST END OAKLAND, I, LLC, FOR 1100 BROADWAY TO REVISE PROVISIONS ON PROJECT DEVELOPMENT, PROPERTY TRANSFER, AND REMEDIES

SUMMARY

The purpose of this report is to request that the Redevelopment Agency approve a resolution authorizing the Agency Administrator to negotiate and execute an amendment to an existing Owner Participation Agreement ("OPA") between East End Oakland I, LLC[1] ("East End") and the Agency related to development of the vacant lot and adjacent Key System building (the "Project") located at 1100 Broadway between 11th and 12th Streets (the "Property"). The amendment would expand the OPA to provide the Agency greater development controls for the site, as well as granting the Agency the right to repurchase the Property in the event East End does not perform as agreed. In exchange for East End providing the Agency these expanded controls, the Agency would agree to release to East End up to $350,000 of liquidated damages paid by East End into escrow on behalf of the previous owner of the Property, Amin-Broadway, upon East End's achievement of certain milestones on the way to complete development of the Property.

FISCAL IMPACT

If the expanded OPA is approved, the $350,000 of the liquidated damages previously paid by East End on behalf of Amin-Broadway would be returned to East End if East End commences construction of the Project according to the expanded OPA terms. The $350,000 is currently in escrow and is scheduled to be automatically released to the Agency on June 1, 2005, absent any action by the Agency to approve an expanded OPA. If East End fails to timely commence construction, the $350,000 would be released to the Agency and the developer would pay an additional $400,000 in liquidated damages to the Agency. Development of the Property by East End with a minimum 125,000 sq. ft. office and retail building or 125-unit residential building within two to three years as required by an expanded OPA is expected to generate tax increment revenues to the Agency and City with an approximate net present value of $2.8 million over the remaining term of the Central District Redevelopment Project. The retail component required by

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[1] East End Oakland 1, LLC is a joint venture of Swinerton Builders, Eastmont Properties Company, the developers of Eastmont Town Center, and Townsend, a wholly owned subsidiary of Swinerton.

zoning under both the current basic OPA and the proposed expanded OPA is expected to generate additional sales tax revenue for the City and contribute to the critical mass of retail that the Agency and City desire to bring Downtown.

If East End were to default on its development obligation, then the $750,000 of liquidated damages the Agency would receive from East End would be deposited into Fund 9553 Account P127010.

BACKGROUND

On April 13, 2000, Amin-Broadway LLC entered into a Disposition and Development Agreement ("DDA") with the Redevelopment Agency for the construction of a 214-room Hilton Garden Inn hotel on the Property, which consists of a vacant land parcel and the adjoining vacant Key System building. The vacant parcel was subsequently sold by the Agency to Amin-Broadway for $960,000. Amin-Broadway had previously purchased the Key System building from a private entity. Pursuant to the DDA, Amin-Broadway merged the two properties after it acquired the vacant parcel from the Agency.

Amin-Broadway began construction on the site in June 2001, but after driving piles for the foundation, construction soon halted due to lack of financing. There has been no development activity on the site since June 2001. In July 2002, the Agency placed Amin-Broadway in default under the DDA for failure to commence and complete the project according to schedule, and began assessing liquidated damages of $1,000 to $2,000 a day for the delay, up to the $400,000 maximum allowed under the DDA.

In May 2002, Swinerton & Walberg, the general building contractor for the project, filed a mechanics lien and breach of contract action against Amin-Broadway, naming the Agency as well, for recovery of $1 million it spent on project design and construction. The Agency was dismissed from the lawsuit pursuant to a settlement agreement approved by the Agency on July 6, 2004. Under the terms of the settlement, the Agency agreed to remove the DDA from the Property and replace it with an OPA, if Swinerton or a new partnership entity it proposed to create acquired title to the Property.

East End was subsequently formed by Swinerton, and took title to the Property in November 2004, subject to the existing OPA. The terms of the existing OPA obligate East End to commence construction on a redevelopment project on the Property within three years of the date of its purchase of the Property, and thereafter diligently pursue the project to completion. This OPA does not specify the nature of the project, except that any new construction on the vacant parcel must have a minimum overall Floor Area Ratio (FAR) of 4.0, and any project must include rehabilitation of the Key System building. If East End fails to commence construction within the three-year period or fails to pursue the project to completion, East End would pay $400,000 to the Agency in liquidated damages.

As part of the sale of the Property to East End, the Agency agreed to release Amin-Broadway from liability for accrued liquidated damages under the previous DDA for the failed Keystone Hotel project, on the condition that (1) $50,000 of the $400,000 in liquidated damages be paid to the Agency immediately, and (2) the remaining $350,000 be placed into escrow pending negotiations over an expanded OPA, with instructions that these funds would be released to the Agency unless the Agency and East End agreed to go forward with an expanded OPA.

City staff and East End have since negotiated the terms of an expanded OPA. The expanded OPA gives the Agency somewhat greater control over the eventual development of the Property by more specifically defining Project parameters, requiring Agency approval of Project plans, restricting the transfer of the Property to another developer, giving the Agency an option to repurchase the Property and transfer it to another developer should East End be unable to successfully develop the Project, and increasing the liquidated damages amount in the event of nonperformance.

KEY ISSUES AND IMPACTS

The following matrix summarizes the differences between the existing basic OPA and the proposed expanded OPA:

PROVISIONS	BASIC OPA	EXPANDED OPA
Vacant site development obligations	Must develop a new project with a minimum Floor Area Ratio (FAR) of 4.0 (i.e. 60,000 SF). No uses specified. (However zoning requires ground floor retail.)	Must develop a new project with at least 125,000 SF of office space or 125 residential units, plus at least 10,000 SF of ground floor retail.
Key System building obligations	Key System building must be rehabilitated. Demolition of exterior is prohibited.	Key System building must be rehabilitated. Demolition of its exterior is prohibited.
Review of plans and specs	No Agency review.	Agency to review and approve plans and specs.
Other Agency review	No Agency review.	Agency to review and approve project finances and construction contract.

PROVISIONS	BASIC OPA	EXPANDED OPA
Project commencement date	Three years from OPA date, November 8, 2004.	Earlier of three years from OPA date or two years from the date UCOP selects a developer.
Preconstruction obligations of developer	None.	Must perform regular maintenance on the site.
Transfer restrictions	None.	Property transfers prior to project completion subject to Agency approval.
Remedies for developer default	Payment of $400,000 in liquidated damages. No security for payment obligation.	(1) Payment of $750,000 in liquidated damages, and (2) Agency option to repurchase the property at fair market value. Liquidated damages payment obligation secured by letter of credit or bond.

The key issue is whether it is more beneficial for the Agency to receive the $350,000 of liquidated damages now in escrow and keep the minimal development controls contained within the existing OPA, or agree to release the $350,000 of liquidated damages in exchange for an expanded OPA which affords greater development controls and rights.

Project Parameters

Under both the current OPA and the proposed expanded OPA, East End is required to renovate and reoccupy the historic Key System building located on the Property. The current OPA only requires that East End develop the approximate 15,000 square foot vacant land portion of the Property with a building of an unspecified nature with a minimum floor area ratio (FAR) of 4.0. FAR is the ratio of the total floor area of a building (excluding parking) to the total land area of the site. Therefore under the current OPA, East End could develop a building with as little as 60,000 square feet, four times the 15,000 square foot vacant portion of the Property. East End would also be free to develop an office or residential building according to any design permitted by current zoning restrictions. Current zoning restrictions would also require East End to develop the ground floor for retail use under any project it might develop.

In contrast, the expanded OPA would require East End to develop either: (a) an office building with a minimum of 125,000 gross square feet of office space and a minimum of 10,000 gross square feet of retail space, along with required parking, or (b) a residential building with at least

125 residential units and a minimum of 10,000 gross square feet of retail space, along with required parking, or (c) a combination of office and residential, where one unit of residential equals 1,000 gross square feet of office (for example, 100,000 gross square feet of office and 25 units of residential), along with a minimum of 10,000 gross square feet of retail space and required parking. The expanded OPA would also require East End to cooperate with the Agency in good faith to obtain a major moderate-to-high quality tenant, who will commit to extended store hours during evenings and weekends, to occupy the retail space in the Property.

Review of Plans and Specifications

The existing basic OPA does not provide for any Agency review of plans and specifications other than that required for any private development under normal zoning and building regulations. The expanded OPA, on the other hand, would require East End to submit schematic design and final construction plans to the Agency for review and approval prior to commencement of construction. The Agency's review would be undertaken to ensure that (1) the Project as proposed to the Agency is embodied in the plans, (2) the Project design maintains a high aesthetic quality comparable to that of the University of California Office of the President (UCOP) headquarters building adjacent to the Property, (3) the Project uses meet the Agency's redevelopment and economic development goals for downtown Oakland, (4) the Project design incorporates principles of environmental sustainability, and (5) any significant negative impacts of the Project to the surrounding area are minimized as much as possible. Any subsequent material changes to Agency approved plans would also require Agency approval under the expanded OPA.

Preconstruction Obligations of Developer

Under the current OPA the East End has no preconstruction obligations, while under the terms of the expanded OPA East End would be required to perform regular maintenance of the Property prior to the start of construction activity. This regular maintenance would include the removal of trash and debris; weed abatement; landscaping; and the repair and painting of fencing around the Property.

Transfer Restrictions

Under the current OPA East End is free to transfer the Property to whomever it chooses. The expanded OPA would make any Property transfer prior to Project completion subject to Agency approval. This would give the Agency more assurance that the Project would eventually be developed in a timely and appropriate manner.

Remedies for Developer Default

Both the current and the expanded OPAs provide for the payment of liquidated damages if East End fails to: 1) commence construction of the Project by specified deadlines and 2) diligently pursue completion of construction. The commencement deadline under the current OPA is November 8, 2007, three years from the date of that OPA. The commencement deadline proposed under an expanded OPA would be the earlier of three years from the date of the expanded OPA, or the date UCOP selects a developer of additional office space for its administrative offices. Liquidated damages under the existing OPA would be $400,000, while under the expanded OPA liquidated damages would be $400,000 plus the $350,000 of liquidated damages currently held in escrow. Furthermore, under the expanded OPA the $400,000 of liquidated damages would be secured by a letter of credit or bond in favor of the Agency from East End with an expiration date five years from the date of the expanded OPA.

The expanded OPA would provide for an additional default remedy in the form of an Agency option to repurchase the Property at fair market value (FMV). This option would allow the Agency to repurchase the Property and find another developer to complete the Project, in the event East End did not timely commence or complete the Project.

CEQA Review

An Environmental Impact Report ("EIR") was prepared for a 150 room hotel by the Community and Economic Development Agency and certified on April 24, 1998. This EIR included thorough analysis of several alternatives including a 240 room hotel and a 300,000 square foot office building.

The amended and restated OPA would require the owner to develop either a 125,000 square foot office building with a minimum of 10,000 square foot of retail, a residential building with at least 125 residential units with a minimum of 10,000 square foot of retail, or a combination of office and residential, where 1 unit of residential equals 1,000 gross square feet of office space.

Staff has reviewed the project descriptions for the three proposed alternatives based on the environmental documents and has determined that the proposed alternatives will be expected to result in the same or reduced environmental effects as the projects analyzed in the EIR pursuant CEQA Guideline Sections 15162 and 15163. Specifically, there are no substantial changes between the proposed project and those studied in the EIR that would cause substantial new effects or a substantial increase in severity of the previously identified impacts. The proposed office building alternative is within the scope of the 300,000 square foot office alternative analyzed in the EIR. The 125 unit residential alternative is within the scope of the 240 hotel room alternative also analyzed in the EIR.

In addition, there have been no substantial changes between the proposed project and those studied in the EIR regarding the circumstances under which the project was analyzed that would cause new environmental impacts or an increase in the severity of the impacts. All recently approved development projects are within the City's residential and commercial projections. For instance, the projected size of the City Center project was smaller than previously approved with the recent approval of the Olson Company's residential project at the City Center T-10 site. Also according to trip generation methodologies and subsequently air quality and noise impacts, traffic from the proposed alternatives is well under trip generations analyzed for the alternatives in the EIR. Furthermore, there has been no new information of substantial importance that would result in the project having new significant effects, showing that previously examined impacts would be made more severe, or that the mitigation measures in the EIR would be infeasible.

The alternatives in the EIR represent the maximum amount of square footage and units that the proposed project would be permitted without certification of a subsequent EIR. Once the developer has submitted a formal application to the Planning and Zoning department, staff will review the proposal in detail and determine whether the project conforms to the certified EIR.

SUSTAINABLE OPPORTUNITIES

Negotiation and execution of an expanded OPA as proposed is expected to create the following sustainable opportunities:

Economic

Approval of the expanded OPA would provide assurance of development of at minimum an office/retail, residential/retail or office/residential/retail project of with at least 125,000 square feet of office space or up to 125 residential units. Such a development is expected to generate various tax revenue, employment, and secondary economic activity which will sustain and enhance Downtown and City-wide economic activity.

Environmental

There are no sustainable environmental opportunities that apply to this particular action. However, the expanded OPA will require that the developer incorporate as many "environmental sustainability" features into the design and construction of the project as are practical and financially feasible.

Social Equity

There are no social equity opportunities related to the proposed Council action.

DISABILITY AND SENIOR CITIZEN ACCESS

The expanded OPA will require that any development on the Project site comply with all applicable local, state and federal regulations including those pertaining to disabled and senior citizen access.

RECOMMENDATION(S) AND RATIONALE

It is recommended that the Redevelopment Agency authorize the Agency Administrator to negotiate and execute an amendment to the OPA with East End that provides for: 1) the Project development parameters described earlier in this report; 2) the Agency's review and approval of Project plans and specifications; 3) East End's regular maintenance of the Property prior to construction commencement; 4) Agency approval of transfer of the Property by East End; 5) East End's payment of liquidated damages of $750,000 if it defaults on commencing and diligently completing the Project; 6) East End's guarantee of $400,000 of these liquidated damages with a 5-year letter of credit or bond in favor of the Agency; 7) the Agency's option to repurchase the Property at FMV in the event of East End's default; 8) the Agency's release back to East End of $350,000 of liquidated damages paid into escrow by East End if it commences the Project by the earlier of three years from the date of the expanded OPA, or two years from UCOP's selection of a developer for its headquarters' expansion.

The negotiation of an expanded OPA that includes the terms listed above will provide the Agency with valuable development controls and protections to assure that a Project consistent and supportive of the Agency's Downtown development strategy is completed in a timely manner. If East End is successful in responding to the pending RFP from UCOP, East End may very well develop a Project that meets or exceeds the parameters laid out in the proposed expanded OPA. Nevertheless, negotiation and execution of an expanded OPA would give the Agency the option of reacquiring the Property and bringing on a new developer in the event East End is not successful in responding to the UCOP RFP, and unable to complete an alternate development within three years. This option provides some assurance that the site will not remain an undeveloped blight indefinitely.

Also, under the expanded OPA if East End does not commence or complete construction of the Project by the deadlines proposed above, the Agency would still be able to collect the $350,000 of liquidated damages in escrow plus another $400,000 of liquidated damages. There would also be the enhancement of these additional liquidated damages being guaranteed by a letter of credit or bond from East End to the Agency. Thus the Agency, though giving up immediate access to the $350,000 of liquidated damages, would still be able to recover those damages plus $400,000 in additional damages if East End were to default on performance of its development obligations under the expanded OPA.

Furthermore, even if East End wins the right to construct an expansion building for UCOP under its RFP, an expanded OPA as proposed above would give the Agency some real control of the building design through the review and approval rights provided for in the OPA.

In summary, staff believes that the extra rights and protections that an expanded OPA would provide give more benefit to the Agency than the immediate receipt of the $350,000 of liquidated damages currently held in escrow.

ACTION REQUESTED OF THE AGENCY

The Agency is requested to approve the attached resolution authorizing the Agency Administrator to negotiate and execute the amendment to the OPA upon the terms described above.

Respectfully submitted,

Daniel Vanderpriem
Director of Redevelopment, Economic Development, Housing and Community Development

Reviewed by:
Jens Hillmer
Economic Development Coordinator

Prepared by:
John Quintal
Economic Development Analyst

APPROVED AND FORWARDED TO THE COMMUNITY AND ECONOMIC DEVELOPMENT COMMITTEE:

OFFICE OF THE AGENCY ADMINISTRATOR

OFFICE OF THE CITY CLERK OAKLAND
APPROVED AS TO FORM AND LEGALITY

2005 APR 28 PM 8:00

AGENCY COUNSEL

REDEVELOPMENT AGENCY OF THE CITY OF OAKLAND

RESOLUTION NO. ________ C.M.S.

A RESOLUTION AUTHORIZING AN AMENDMENT TO THE OWNER PARTICIPATION AGREEMENT WITH EAST END OAKLAND I, LLC, FOR 1100 BROADWAY TO REVISE PROVISIONS ON PROJECT DEVELOPMENT, PROPERTY TRANSFER, AND REMEDIES

WHEREAS, pursuant to Agency Resolution No. 2004-30 C.M.S., the Redevelopment Agency and East End Oakland I, LLC, a California limited liability company ("East End") entered into an Owner Participation Agreement on November 8, 2004, (the "OPA") providing for redevelopment of a vacant lot and the preservation and rehabilitation of the Key System building at 1100 Broadway (the "Property") in the Central District Redevelopment Project Area; and

WHEREAS, as part of the purchase of the Property by East End, and as a condition of the termination of the previous Disposition and Development Agreement for the Keystone Hotel project, East End placed $350,000 into escrow in satisfaction of the liquidated damages that accrued to the Agency pursuant to said Disposition and Development Agreement; and

WHEREAS, East End and the Agency wish to amend the OPA to revise provisions related to project development, Property transfers, and remedies; and

WHEREAS, to this end, East End and Agency staff have negotiated an Amended and Restated Owner Participation Agreement which modifies the original OPA as follows:

- Provides that East End must develop a project of at least 125,000 square feet of office space or 125 residential units, plus at least 10,000 square feet of ground floor retail.
- Provides for Agency review and approval of project plans and specifications, financing, and construction contract.
- Revises the project commencement date to be the earlier of three years from the OPA date or two years from the date the University of California Office of the President selects a developer for its office expansion project.
- Requires East End to perform regular predevelopment maintenance of the Property.

- Requires Agency approval of Property transfers prior to project completion.
- Grants the Agency an option to repurchase the Property at fair market value if East End defaults on its development obligations.
- Provides for liquidated damages to the Agency of $750,000 if East End defaults on its development obligations, with the $350,000 now in escrow to be released to East End if it meets the project commencement date.

WHEREAS, an Environmental Impact Report ("EIR") (certified by the Planning Commission on April 24, 1998) was prepared for a 150 room hotel as previously proposed by the Community and Economic Development Agency, and has been independently reviewed and considered by the Agency in evaluating the proposed Project in compliance with the CEQA Guidelines Sections 15162 and 15163.

WHEREAS, none of the circumstances necessitating preparation of a subsequent or supplemental EIR are present. Specifically, there are no new substantial changes to the project or the circumstances surrounding the project and no new information of substantial importance that will involve new significant impacts or an increase in the severity of previously identified impacts. All potentially significant impacts (with the possible exception visual quality and architectural resources that were fully analyzed in the EIR) will be reduced to a less than significant level by conditions of approval and implementation of the adopted mitigation Monitoring Program imposed on the Project.

now, therefore, be it

RESOLVED: That the Agency Administrator is hereby authorized to negotiate and enter into an Amended and Restated Owner Participation Agreement with East End for the 1100 Broadway project consistent with the terms set forth above; and be it further

RESOLVED: That any liquidated damages received by the Agency under the provisions of the Amended and Restated Owner Participation Agreement shall be deposited into Fund 9553 Project P127010; and be it further

RESOLVED: That the Agency Administrator is authorized to take whatever action is necessary with respect to the Amended and Restated Owner Participation Agreement and the project consistent with this Resolution and its basic purposes.

RESOLVED: That the Agency Administrator is authorized to take whatever action is necessary with respect to the Amended and Restated Owner Participation Agreement and the project consistent with this Resolution and its basic purposes.

IN AGENCY, OAKLAND, CALIFORNIA, _______________, 2005

PASSED BY THE FOLLOWING VOTE:

AYES- BROOKS, BRUNNER, CHANG, NADEL, QUAN, REID, AND CHAIRPERSON DE LA FUENTE

NOES-

ABSENT-

ABSTENTION-

ATTEST:_______________________________

LATONDA SIMMONS
Interim Secretary of the Redevelopment Agency
of the City of Oakland